

STATE OF WISCONSIN CLAIMS BOARD

On August 17, 2021, the State of Wisconsin Claims Board met via Zoom videoconference and considered the following claims:

Hearings were conducted for the following claims:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
1. William Keefrey	University of Wisconsin	\$262.96
2. Zenith Tech, Inc.	Department of Transportation	\$949,428.70

The following claims were decided without hearings:

<u>Claimant</u>	<u>Agency</u>	<u>Amount</u>
3. Ronald Lane	Department of Corrections	\$234.03
4. Jeffrey E. Olson	Department of Corrections	\$289.08
5. Efrain Sanchez	Department of Corrections	\$838.83
6. Korey A. Warren	Department of Corrections	\$174.83

With respect to the claims, the Board finds:

(Decisions are unanimous unless otherwise noted.)

1. William Keefrey of Sun Prairie, Wisconsin claims \$262.96 for damage to his vehicle on April 6, 2021, as he was driving into UW Hospital Parking lot 75 on Highland Avenue. Above the road leading to the parking ramp entrance there is a metal arch hung with large plastic pipes to provide a clearance warning. As Keefrey approached the archway, a tether holding one of the plastic pipes broke and one end of the pipe fell, striking the front end of his vehicle. The pipe damaged vehicle's front grill logo and scratched the front bumper. Keefrey reported the incident to the information desk at the hospital and by the time he was done with his appointment the pipe had been reattached to the metal beam. Keefrey believes the UW failed to properly maintain the clearance warning archway and pipes and reimbursement for the damage to his vehicle.

The University of Wisconsin-Madison believes that there was no liability on the part of any UW employee and recommends denial of this claim.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

2. Zenith Tech, Inc. of Waukesha, Wisconsin claims \$949,428.70 for damages related to a project for removal and reconstruction of the West Milwaukee Street Rock River Bridge in Janesville, Wisconsin. Zenith Tech (ZTI) states that the water levels on site were dangerously high throughout much of the project and created site conditions materially different than those indicated in the contract documents. Due to the unanticipated river level and velocity, ZTI asked DOT to delay the start of the project, but DOT refused. ZTI believes DOT's refusal was arbitrary and in bad faith. For the safety of its workers, ZTI had to obtain different equipment to complete its work, which resulted in delays and significant additional costs. ZTI notes that DOT does not dispute that the river flows and water levels experienced on site far exceeded those indicated in specifications. DOT alleges that ZTI should not have relied on the hydraulic information in the specifications, but ZTI notes that it was DOT which chose to add that data to the bid documents. ZTI agrees it was responsible for choosing the means and methods for performing the work but notes that DOT does not dispute the fact that different equipment was needed to conduct work in the river at velocities twice what was expected. ZTI denies the

assertion that it understaffed the project and notes that DOT has provided no proof that it did so. ZTI believes it is entitled to an equitable adjustment in the contract price because conditions on the project were materially different from the conditions stated in the plans and specifications. ZTI requests reimbursement of \$471,926.70 for additional costs, \$276,902.00 for winter inefficiency costs, and reversal of \$165,600.00 in liquidated damages imposed by DOT.

DOT recommends denial of this claim. The bid documents clearly stated that the river flow data in the specifications was provided for the bidder's general information. DOT believes ZTI's claim that this data somehow guaranteed specific river conditions is absurd because there is no possible way to guarantee a river's water level or velocity at any given point in time. ZTI's own photos from their pre-bid site tour clearly show water marks on the bridge far above the level of the river at that time. DOT states that ZTI was responsible for choosing the means and methods for performing its work and did so with the knowledge that the equipment upon which it based its bid would be unsuitable if the river was substantially higher or faster than average. DOT states that the heavy rains which caused the increased river elevation and velocity were an act of nature, not a change in site conditions that allow for additional compensation. DOT claims that it abided by the language of the contract by extending the project dates to account for these weather-related delays. DOT notes that ZTI is now arguing differing site conditions caused the high river flow even though in 2018 it requested and received delays on the basis that adverse weather was the cause. DOT believes its decision not to delay the project was not arbitrary or done in bad faith, but was based on several factors, including the fact that the water level was trending downward and there was other work ZTI could perform while the water was high. DOT believes there is ample evidence that ZTI understaffed the project and had previously notified ZTI that it would be in default of the contract if it did not commit adequate resources to the project.

The Board concludes that ZTI did not demonstrate the criteria necessary to justify a change order for differing site conditions under the contract; however it has raised questions of fact regarding whether its request to delay the project's start date should have been granted, and the resulting liquidated damages. The Board concludes that such matters are better evaluated by a court of law, and therefore, the Board denies payment of this claim.

3. Ronald Lane of Waupun, Wisconsin claims \$234.03 for restitution payments deducted by DOC. Lane was convicted of three burglaries committed in October 2003 along with his nephews, George Saunders and Shaun Halper. The burglaries took place at the Club Forest Tavern in Portage County, Dayton Hills Tavern in Richland County, and Kickapoo Inn in Vernon County. The Judgements of Conviction (JOCs) for the Kickapoo Inn and Dayton Hills Tavern burglaries ordered Lane, Saunders, and Halper to pay restitution to the same parties in the same amounts, jointly and severally. The JOCs for the Club Forest Tavern burglary ordered all three to pay restitution to the same parties (Todd & Pam Booth, Society Insurance, and Encompass Insurance) in the same amounts. However, while Halper's and Saunders' JOCs stated the restitution was to be paid jointly and severally, Lane's JOC did not contain that language. Lane alleges that Halper satisfied the restitution payments for the Club Forest Tavern. He points to DOC account statements showing Halper made restitution payments to Society Insurance, Encompass Insurance, Daniel Goska, and Van Beck Vending regarding cases in Portage and Wood counties. The court later vacated all three co-defendants' restitution orders for Dayton Hills Tavern and Kickapoo Inn. Halper's and Saunders' restitution orders were also vacated for Club Forest Tavern, but Lane's was not. In November 2019, Portage County Judge Robert Shannon vacated Lane's restitution for Club Forest Tavern and ordered DOC to reimburse him \$234.03. Lane believes that a DOC employee may have stolen the money that should have gone to Society Insurance. Lane notes that two different judges have determined that the Club Forest Tavern restitution was paid. He believes that DOC should have appealed Judge Shannon's order if they disagreed with it, but because they did not do so they are now required to follow the order and reimburse him.

DOC believes that the courts erred in vacating Lane's, Halper's and Saunders' Club Forest Tavern restitution obligations. DOC also believes the Judge Shannon lacked jurisdiction to order DOC to reimburse Lane. DOC notes that in addition to the three crimes they

committed with Lane, Halper and Saunders by themselves also burglarized Goose's Pub, located in Wood County. Society Insurance insured both Club Forest Tavern and Goose's Pub and was owed restitution in both burglaries. DOC notes that Lane's JOC for Club Forest Tavern did not indicate that his restitution should be paid jointly and severally with Halper and Saunders. DOC also can find no evidence that the Club Forest Tavern restitution was satisfied as Lane alleges. The available evidence related to Club Forest Tavern restitution payments shows the following: for Society Insurance - \$9,443.35 ordered minus \$549.88 (Halper) and \$151.05 (Lane) = \$8,679.35 still owed and for Encompass Insurance - \$5,197.00 ordered minus \$302.64 (Halper) and \$95.77 (Lane) = \$4,798.59 still owed. Although there was money confiscated by law enforcement from the Club Forest Tavern burglary which went to some of the victims, court records indicate that Society Insurance did not receive any of that money. DOC believes Lane may have committed a fraud upon the courts and is now trying to perpetrate a fraud upon the Claims Board by deliberately misrepresenting Halper's Wood County restitution payments as proof of satisfaction of the Club Forest Tavern restitution. DOC believes Lane is fully aware that the Wood County restitution payments relate to the Goose's Pub burglary, a crime in which Lane did not participate. DOC believes that, although there may be some confusion regarding payments made to other victims in the Club Forest Tavern case, the evidence shows that at a minimum, Lane still owes thousands of dollars to Society Insurance for his role in that crime.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

4. Jeffrey E. Olson of Green Bay, Wisconsin claims \$289.08 for costs related to a tablet damaged by DOC staff at Waupun Correctional Institution (WCI). On November 5, 2020, Olson was transferred from his regular cell to temporary lock-up (TLU) and DOC staff packed up his property, which included a tablet, tablet cover, and charger he had purchased in March 2019. Olson states that although he had previously repaired the charger wires, the tablet and charger still worked, and the tablet was charging in his cell when he was taken to TLU. On November 8, 2020, property staff notified Olson that his tablet and charger were contraband because the charger was damaged, and inmates were not allowed to have a tablet without a charger. Olson notes that DOC made no mention of any damage to the tablet. He states that he has not found any rule stating inmates can't have a tablet without a charger and he does not believe there is such a rule. On November 19, 2020, Olson filed an inmate complaint about the seizure of his tablet and informed both the property room and the inmate complaint office that he had ordered a new charger. His complaint was dismissed on December 15, 2020, because DOC claimed the tablet was damaged. During DOC's investigation of the complaint, a correctional officer stated that he "tried several chargers [in the tablet] and was able to get one to intermittently start charging but had to wiggle it around while plugged in." The officer further stated that "it appears the charging port is loose from the circuit board which explains why [the tablet] doesn't stay charging." Olson believes the officer had no authorization to test the tablet by plugging in and "wiggling around" multiple chargers and that it was this action that damaged the tablet. Olson further believes that the officer may have damaged the tablet intentionally in order to justify its seizure. Olson requests reimbursement for his original tablet, cover, and charger (\$136.10); the replacement charger he purchased for his original tablet (\$9.50); and the new tablet, cover, and charger he had to purchase (\$143.48). Olson believes DOC waived its right to determine the amount he should be reimbursed when it improperly dismissed his inmate complaint and that he should be awarded the full amount he is requesting.

The Department of Corrections recommends payment of this claim in the reduced amount of \$118.38. Division of Adult Institution Policy 310.00.03 governs reimbursement for inmate property damaged by DOC staff. That policy sets forth a reasonable depreciation schedule to determine fair compensation amounts and provides that the value of property "shall equal its value at the time of loss or damage and shall not exceed the purchase price." Based on the depreciation schedule, DOC recommends compensating Olson for his original tablet, cover, and charger at 80% depreciation (\$108.88) and his replacement charger at full

value (\$9.50). DOC believes the state has no obligation to compensate Olson for his new tablet and accessories, which he continues to own.

The Board concludes the claim should be paid in the reduced amount of \$118.38 based on equitable principles. The Board further concludes, under authority of Wis. Stat. § 16.007 (6m), payment should be made from the Department of Corrections appropriation Wis. Stat. § 20.410 (1)(a).

5. Efrain Sanchez of Oregon, Wisconsin claims \$838.83 for wages allegedly owed to him by the Department of Corrections. Sanchez is employed at Waupun Dairy through the Bureau of Correctional Enterprises (BCE). Sanchez alleges that DOC underpaid him for his work at the Creamery in violation of DOC Policy 309.55.01, which states, “[i]nmates who work offsite on another facility’s grounds are to be paid a standard rate of \$1.00 per hour for actual hours worked.” Sanchez also alleges that DOC incorrectly calculated his overtime pay. He points to Wis. Admin. Code DOC 313.12(3), which states, “[o]vertime pay at the rate of one and one-half times the base wage shall be given to inmate employees for hours worked in excess of 40 hours per week.” Sanchez was paid an overtime rate of \$0.02 per hour instead of 1.5 times his base wage. In response to an inmate complaint filed by Sanchez, DOC corrected his overtime rate going forward but refused to award back pay. Sanchez believes agencies are required to follow the rules they promulgate and requests reimbursement in the amount of \$337.13 for underpaid base wages and \$501.70 for his overtime back pay.

DOC believes this claim should be denied based on the state’s sovereign immunity and the fact that Sanchez failed to exhaust his administrative remedies prior to filing a claim with the Claims Board. DOC disputes Sanchez’s claim that DOC Policy 309.55.01 requires a minimum pay of \$1.00 per hour for his work at the Creamery. His argument rests on a portion of the policy which references inmates working “offsite on another facility’s grounds,” however, Sanchez is employed by BCE, not by another institution. The same policy clearly states that BCE worker’s compensation is governed by Wis. Admin. Code DOC 313, which designates five pay grades for agricultural workers ranging from \$0.20 per hour to \$1.20 per hour. Sanchez began working at the Creamery in September 2020 at a rate of \$0.50 per hour and was making \$1.00 per hour by November 2020. In response to Sanchez’s complaint regarding his overtime pay DOC amended its overtime policy for agricultural workers and adjusted his overtime rate from that point forward. DOC does not believe Sanchez is entitled to back pay because he is not an employee of the state. Wis. Admin. Code DOC 313.01 provides that the purpose of prison industries is to “[p]rovide inmates with work skills, habits, and training necessary to compete in the job market, thereby increasing the potential for a successful return to society.” DOC notes that work skills and rehabilitation, not compensation, is the primary goal of BCE. DOC believes it responded appropriately to Sanchez’s complaint regarding overtime and that this portion of his claim is also without merit.

The Board concludes that Sanchez’s claim for underpaid base wages should be denied and that his claim for overtime back pay should be paid in the amount of \$501.70, based on equitable principles. The Board further concludes, under authority of Wis. Stat. § 16.007 (6m), payment should be made from the Department of Corrections appropriation Wis. Stat. § 20.410 (1)(kf).

6. Korey A. Warren of Boscobel, Wisconsin claims \$174.83 for the cost of a television allegedly damaged by Department of Corrections staff. In March 2019, Warren purchased a new television while an inmate at Waupun Correctional Institution (WCI). On April 20, 2019, WCI staff packed up his property prior to his transfer to the Wisconsin Secure Program Facility (WSPF). Warren notes that he was present when WCI staff inventoried his property and that his TV was not damaged. He alleges that if the TV had been damaged, it would have been seized during the inventory and would not have been transferred to WSPF with the rest of his property. After his transfer, WSPF staff told Warren the TV was cracked and therefore not allowed. Warren believes that WCI staff damaged his TV when they were packing his property and then added the damage notation to his property inventory sheet after the fact in order to cover up their negligence. He requests reimbursement for the full value of his television.

DOC believes this claim should be denied based on the state's sovereign immunity and the fact that Warren failed to exhaust his administrative remedies. Warren filed an inmate complaint regarding this matter, but only against WSPF. DOC's investigation found no evidence that the television was damaged by WSPF staff and that WCI staff had indicated on the pack-up inventory that the TV screen was damaged. DOC Policy does allow inmates to keep damaged items which are still in working condition provided the damage is minor and does not pose a safety risk. DOC notes that this is a subjective standard, the interpretation of which varies from facility to facility based on the needs of the institution. A sending facility may transfer a damaged item with an inmate so that the receiving facility can decide whether the item can be kept in their institution. Because Warren failed to properly file his complaint against WCI, DOC does not have the benefit of a timely investigation into WCI's actions. However, DOC believes it is likely that WCI staff sent the TV to WSPF so that staff at that institution could make the decision whether to allow the TV at their facility. DOC believes Warren has provided no evidence to support his allegation that his TV was damaged while under control of DOC staff.

The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employees and this claim is neither one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

The Board concludes:

That payment of the amount below to the identified claimant from the following statutory appropriation is justified under Wis. Stat. § 16.007(6)(b).

Jeffrey E. Olson	\$118.38	Wis. Stat. § 20.410 (1)(a)
Efrain Sanchez	\$501.70	Wis. Stat. § 20.410 (1)(kf)

That the following identified claims are denied:

William Keefrey
Zenith Tech, Inc.
Ronald Lane
Korey Warren

Dated at Madison, Wisconsin this 3rd day of September, 2021

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Corey Finkelmeier

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Corey Finkelmeier, Chair
Representative of the Attorney General

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Anne L. Hanson

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Anne L. Hanson, Secretary
Representative of the Secretary of
Administration

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Mary Felzkowski

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Mary Felzkowski
Senate Finance Committee

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Terry Katsma

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Assembly Finance Committee